FILED

MAR 22 2002

CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

TODD JONGELING, Plaintiff, vs. UNITED STATES ARMY CORPS OF ENGINEERS, Defendant.	*	CIV. 02- 1020 **COMPLAINT**

Plaintiff Todd Jongeling, for his complaint against Defendant United States Army Corps of Engineers ("Corps of Engineers"), states and alleges as follows:

1.

This action is brought under the Freedom of Information Act, as amended, 5 U.S.C. § 552(a)(4)(B), and seeks a preliminary and final injunction enjoining the withholding of certain information from Plaintiff and directing that the information be disclosed.

2.

Plaintiff resides at Rural Route 1, Box 221, Estelline, Deuel County, South Dakota. Defendant Corps of Engineers is a federal administrative agency within the meaning of the Act.

3.

The Court has jurisdiction over this action and venue is properly in this Court pursuant to 5 U.S.C. § 552(a)(4)(B).

4.

Defendant Corps of Engineers is in possession and has control over a report related to flooding problems around Lake Poinsett, South Dakota, completed by Mr. Martin Keller, an employee of the Corps of Engineers, during the fall of 1999 (hereinafter "the Report"). By letter dated January 18, 2002, Jon K. Lauck, as counsel for Plaintiff, duly requested in writing that Defendant Corps of Engineers, through the appropriate officer or employee of that agency, disclose the Report to Plaintiff and that the Corps of Engineers permit inspection and copying of the Report. Defendant Corps of Engineers refused this request in writing on February 1, 2002. A true and correct copy of the letter requesting the Report is attached hereto as ***Exhibit A***. A true and correct copy of the correspondence from Gary M. Henningson, district counsel for the Corps of Engineers, denying the request is attached hereto as ***Exhibit B***.

5.

By letter dated January 24, 2002, United States Senator Tom Daschle, on behalf of Plaintiff, also requested a copy of the Report. By letter dated February 7, 2002, the Defendant Corps of Engineers denied Senator Daschle's request for the Report on behalf of Plaintiff. A true and correct copy of the January 24, 2002, correspondence from Senator Daschle to Defendant Corps of Engineers is attached hereto as ***Exhibit C***. A true and correct copy of Defendant Corps of Engineers' February 7, 2002, correspondence denying Senator Daschle's request for the Report on behalf of Plaintiff is attached hereto as ***Exhibit D***.

6.

By letter dated March 4, 2002, United States Senator Tom Daschle, on behalf of Plaintiff, again requested a copy of the report. The Defendant Corps of Engineers has failed to respond to Senator Daschle's request for the report on behalf of Plaintiff. A true and correct copy of the

March 4, 2002 correspondence from Senator Daschle to Defendant Corps of Engineers is attached hereto as ***Exhibit E***.

7.

By letter dated March 4, 2002, Congressman John Thune, on behalf of Plaintiff, also requested a copy of the report. The Defendant Corps of Engineers has failed to respond to Congressman Thune's request for the report on behalf of Plaintiff. A true and correct copy of the March 4, 2002 correspondence from Congressman Thune to Defendant Corps of Engineers is attached hereto as ***Exhibit F***.

8.

By letter dated February 13, 2002, attorneys for Plaintiff appealed the Defendant Army Corps of Engineers' decision to reject the Plaintiff's Freedom of Information Act request for the Report. A true and correct copy of the February 13, 2002, appeal by Plaintiff is attached hereto as ***Exhibit G***. Pursuant to 5 U.S.C. § 552(a)(6)(A)(ii), the Defendant Corps of Engineers is provided twenty (20) working days to respond to a Freedom of Information Act appeal. The twenty (20) working days provided by 5 U.S.C. § 552(a)(6)(A)(ii) expired on March 14, 2002. On March 21, 2002, Defendant Army Corps of Engineers still had not responded to the Freedom of Information Act appeal dated February 13, 2002, in violation of 5 U.S.C. § 552(a)(6)(A)(ii).

9.

The Report is and was an identifiable record within the meaning of the Freedom of Information Act. Defendant Corps of Engineers' refusal to disclose the Report to Plaintiff was wrongful and without lawful reason or excuse, and Plaintiff is entitled to the relief provided by the Act.

WHEREFORE Plaintiff requests judgment as follows:

1. For a preliminary and final injunction prohibiting Defendant from withholding from Plaintiff the Report referred to and described above;

2. For a preliminary and final injunction directing Defendant to make the described Report available to Plaintiff and Plaintiff's attorneys and to permit the inspection and copying of the Report;

3. For attorneys' fees and costs; and

4. For such other and further relief as the Court deems just and equitable.

Dated at Sioux Falls, South Dakota, this 21st day of March, 2002.

DAVENPORT, EVANS, HURWITZ &
SMITH, L.L.P.

Mark W. Haigh
Jon K. Lauck
206 West 14th Street – PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880
Facsimile: (605) 335-3639
Attorneys for Plaintiff

EXHIBIT A

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.
LAWYERS

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LOUIS R. HURWITZ
JEAN H. BENDER

HOLTON DAVENPORT
1892-1966
ELLSWORTH E. EVANS
1903-1996
DEMING SMITH
1920-1996

January 18, 2002

Direct Dial: 605-357-121
E-mail: jlauck@dehs.cor

VIA FACSIMILE/U.S. MAIL
402-221-4061

US Army Corps of Engineers
Attn: Lana Olson
CENWO-OC
Omaha District, Corps of Engineers
106 South 15th Street
Omaha, NE 68102-1618

Dear Lana:

Thank you for your help on the telephone this afternoon. As we discussed, I am looking for a report authored by the Corps of Engineers sometime in 1998 or 1999. The author of the report was Martin Keller, who worked in the operations office of the Corps of Engineers in Omaha, and it analyzed the flooding situation in and around Lake Poinsett, South Dakota. In particular, the study analyzed flooding that resulted from the installation of gates on the outlet which connected Lake Poinsett and the Big Sioux River. We agree to pay the charges associated with acquiring this study. Please call us if you have any questions regarding this matter. Many thanks for your help.

Sincerely,

JON K. LAUCK
For the Firm

JKL:rvb

cc: Mark Haigh
Todd Jongeling
Jon Brown

EXHIBIT B

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
106 SOUTH 15TH STREET
OMAHA, NEBRASKA 68102-1618

REPLY TO
ATTENTION OF:

February 1, 2002

Office of Counsel

Mr. Jon K. Lauck
Davenport, Evans, Hurwitz & Smith, L.L.P.
513 South Main Avenue
P.O. Box 1030
Sioux Falls, South Dakota 57101-1030

Dear Mr. Lauck:

This letter is in response to your Freedom of Information Act (FOIA) request dated January 18, 2002, and your subsequent clarification letter dated January 23, 2002. Your request asked for a copy of a report authored by Martin Keller in the summer of 1999 concerning the flooding situation in and around Lake Poinsett.

It is the policy of the Department of the Army to release the maximum amount of information under the Freedom of Information Act unless the information is exempt from release and a significant reason exists for nondisclosure.

I have reviewed the preliminary report prepared by Martin Keller dated November 9, 1999, and have determined that this document is exempt from disclosure under Exemption 5 of the FOIA, 5 U.S.C. §552(b)(5). Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." It encompasses the deliberative process privilege, the attorney work-product privilege, and the attorney-client relationships with their lawyers. See, e.g., Coastal States Gas Corp. v. DOE, 617 F.2d 854, 856 (D.C. Cir. 1980). Such confidential communications are shielded from disclosure in order to encourage full and frank discussions between the client and his or her attorney. Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977). The purpose behind the deliberative process privilege is to "prevent injury to the quality of agency decisions", NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975), by encouraging honest and frank discussion with the agency, and to protect against confusion which might result from disclosure of reasons and rationales that were not ultimately adopted as the grounds for the agency's action, Jordan v. Department of Justice, 591 F.2d 772-773 (D.C. Cir. 1978).

The report prepared by Mr. Keller is protected by the attorney-client privilege and the deliberative process privilege. The report was prepared for the Omaha District, Office of Counsel, for consideration and was reviewed in the course of the Corps' eventual decision not to re-open the permit for reconsideration.

I trust that you will appreciate the consideration upon which this determination is based. However, because your request has been denied, you are advised of your right to appeal this determination to the Secretary of the Army (ATTN: General Counsel). An appeal must be received within 60 calendar days of the date of this letter. The envelope containing the appeal should bear the notation "Freedom of Information Act Appeal" and should be sent to: U.S. Army Engineer District, Omaha, ATTN: CENWO-OC, 106 South 15th Street, Omaha, Nebraska 68102-1618.

Under the Freedom of Information Act, I have determined that your request falls into the "all others" category. This category grants the requester two hours of free search time and the first 100 duplicated pages free of charge. For any search time beyond the first two hours and any duplicated pages beyond the first 100 pages, the requester is charged $12.00 per hour for clerical time, $25.00 per hour for professional time, and $.15 per duplicated page. Since the cost of processing your request was nominal, there will be no charge.

Sincerely,

Michael W Reilly

for Gary M. Henningsen
District Counsel

EXHIBIT C

THOMAS DASCHLE
SOUTH DAKOTA

COMMITTEE
AGRICULTURE

(202) 224-2321
TOLL FREE 1-800-424-9094
Email: Tom_Daschle@daschle.senate.gov
Internet: http://www.senate.gov/~daschle

United States Senate
WASHINGTON, DC 20510-4103

320 South First Street, Suite 101
P.O. Box 1536
Aberdeen, SD 57402-1536
(605) 225-8823

1313 West Main Street
P.O. Box 8168
Rapid City, SD 57709
(605) 348-7551

320 North Main Avenue, Suite 8
P.O. Box 1274
Sioux Falls, SD 57101-1274
(605) 334-9596
TDD (605) 334-4632

January 24, 2002

Michael Reilly
U.S. Army Corp of Engineers
106 South 15th Street
Omaha, NE 68102-1618

Dear Mr. Reilly:

I recently have been contacted by Todd Jongeling of Estelline, South Dakota regarding a request for a U.S. Army Corp of Engineer report.

Mr. Jongeling, a farmer in the Hamlin County area of South Dakota, is requesting a study authored by Martin Keller on flooding issues around Lake Poinsett. I have assured Mr. Jongeling that I will seek whatever assistance you are able to provide in releasing a copy of the study.

Given the impact that recent world events have had on mail safety, I respectfully request that you fax a copy of the study or any other correspondence regarding this matter to my Sioux Falls office at 605.334.2591 or reply via email to steve_dick@daschle.senate.gov. Any text needed in your email should be included in the email itself, not as an attachment.

With best wishes, I am

Sincerely,

Tom Daschle
United States Senate

TAD/sld

PRINTED ON RECYCLED PAPER

EXHIBIT D

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
106 SOUTH 15TH STREET
OMAHA, NEBRASKA 68102-1618

February 7, 2002

REPLY TO ATTENTION OF:
District Engineer

VIA FACSIMILE

Honorable Tom Daschle
320 North Main Avenue, Suite B
Sioux Falls, South Dakota 57101-1274

Dear Senator Daschle:

Thank you for your letter of January 24, 2002 to Michael Reilly of my legal staff. Your letter, which Mr. Reilly received on February 1, explained that Mr. Todd Jongeling of Estelline, South Dakota had contacted you concerning a report prepared by Martin Keller, another member of my staff who works in Omaha District's Regulatory Branch. The report pertained to a permit issued by the District in 1987 to what is now known as the Lake Poinsett Water Project District. The permit, issued in accordance with section 404 of the Clean Water Act, authorized construction of a concrete flood control gate structure.

The report, developed by Mr. Keller in the fall of 1999, was never finalized. It was a draft document prepared for, and submitted to, our Office of Counsel, and was intended to facilitate internal discussion and review. That review led to a reaffirmation by the District that the 1987 permit was in compliance with applicable regulations and guidance. My predecessor, Colonel Mark E. Tillotson, subsequently concluded that it would be inappropriate to reopen or otherwise reconsider the permit. Colonel Tillotson advised Mr. Robert Harrenga, another of your constituents, of his decision by letter dated March 17, 2000.

Release of predecisional and deliberative documents, such as drafts, working papers, and those containing comments and recommendations, could cast a chilling effect upon the frank and forthright discussions so vital in an agency's decision-making process. Disclosure of such documents could also lend to confusion and misinformation. Moreover, if communications between District employees and District staff attorneys are not protected, the ability of agency attorneys to obtain internally the full range of information and opinion needed to render sound legal advice in the public interest could be compromised. Accordingly, we must respectfully decline to release the draft document which was the subject of Mr. Jongeling's inquiry to you.

If you have further questions or need clarification of this matter, please contact me or Kathryn Schenk, Chief, Regulatory Branch, at (402) 221-4211.

Sincerely,

Deputy Commander

Kurt F. Ubbelohde
Colonel, Corps of Engineers
District Engineer

EXHIBIT E

THOMAS DASCHLE
SOUTH DAKOTA

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AGRICULTURE
(202) 224-2321
TOLL FREE 1-800-424-9094
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320 North Main Avenue, Suite S
P.O. Box 1274
Sioux Falls, SD 57101-1274
(605) 334-9596
TDD (605) 334-4632

March 4, 2002

Colonel Kurt Ubbelohde
District Engineer
U.S. Army Corps of Engineers, Omaha District
215 North 17th Street
Omaha, NE 68102-4978

Dear Colonel Ubbelohde:

For the past several years I have supported my constituent Robert Harrenga of Hamlin County, South Dakota as he has endeavored to access Corps engineering reports and documents that are relative to the 1987 issuance of a Section 404 permit for the construction of a flood control structure in the inlet/outlet channel of Lake Poinsett, SD.

The structure was intended to adjust the natural flow of water between the lake and the Big Sioux River. A consequence of the project has been the continuous flooding of farmland in the Big Sioux River Valley.

On three occasions between October 1999 and October 2000, your office declined my request for a copy of a draft document prepared by Martin Keller of your regulatory staff. Subsequently, your office denied a Freedom of Information Act (FOIA) request by Mr. Harrenga.

Early this year, Sioux Falls attorney Jon Lauck, on behalf of clients, submitted a FOIA request for the Keller report. In a February 1 decision, the Corps denied his request. He filed an appeal of that decision on February 13. My purpose in writing is to offer my support to the efforts of Mr. Lauck and his clients to secure the requested documents.

Thank you in advance for your consideration of Mr. Lauck's request. I look forward to learning of your decision.

With best wishes, I am

Sincerely,

Tom Daschle

Tom Daschle
United States Senate

TAD/mjg

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EXHIBIT F

JOHN THUNE
SOUTH DAKOTA, AT LARGE

COMMITTEE ON AGRICULTURE

COMMITTEE ON SMALL BUSINESS

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

SOPHOMORE LEADERSHIP LIAISON

Congress of the United States
House of Representatives
Washington, DC 20515–4101

1005 LONGWORTH BUILDING
WASHINGTON, DC 20515
(202) 225–2801
jthune@mail.house.gov

DISTRICT OFFICES:

SIOUX FALLS
2310 W. 41ST STREET, SUITE 101
SIOUX FALLS, SD 57105
(605) 331–1010
(800) 755–5646

RAPID CITY
2525 W. MAIN STREET, SUITE 210
RAPID CITY, SD 57702
(605) 342–5135

ABERDEEN
10 6TH AVENUE, SW
ABERDEEN, SD 57401
(605) 622–7988

March 4, 2002

Secretary of the Army
Atten: General Counsel
U.S. Army Engineer District, Omaha
106 South 15th Street
Omaha, NE 68102

Dear General Counsel:

Recently, you received an appeal from Jon Lauck regarding the release of the Keller report under the Freedom of Information Act. I write in support of Mr. Lauck's request.

As you will note, the Keller report pertains to the Lake Poinsett area in Hamlin County, South Dakota. In his appeal, Mr. Lauck cites numerous reasons as to why this report should be released.

Thank you for your time and consideration of this request. Your thorough and expeditious review would be greatly appreciated. I look forward to your response.

Very truly yours,

JOHN THUNE
Member of Congress

JT:mv

EXHIBIT G

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.
LAWYERS

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Direct Dial: 605-357-12
E-mail: jlauck@dehs.cc

February 13, 2002

Secretary of the Army
Attn: General Counsel
U.S. Army Engineer District, Omaha
Attn: CENWO-OC
106 South 15th Street
Omaha, NE 68102-1618

Re: FREEDOM OF INFORMATION ACT APPEAL

Dear Sir or Madam:

This letter is in response to the Army Corps of Engineers' decision to reject our Freedom of Information Act ("FOIA") request for a Corps document. We were informed of this decision by letter dated February 1, 2002. We had sought a copy of an engineering report, completed in 1999, authored by Mr. Martin Keller of the Army Corps of Engineers Regulatory Branch. In 1996, the Corps of Engineers was asked to review a Section 404 permit that it granted in 1987 allowing the construction of a control structure on the outlet of Lake Poinsett in the state of South Dakota. In 1997, the Corps conducted a review of the Lake Poinsett situation. This review resulted in the release of the *Summary of Technical Review of Operation of Flood Control Gates, Lake Poinsett Area Development (DA Permit No. 19808953)*. This Corps of Engineers report called for additional data collection and research on the Lake Poinsett situation. This included stage data, water surface elevation, Sioux River discharges, a channel survey and other technical and scientific measurements. A copy of the *Summary of Technical Review* is attached to this letter to give you an understanding of the scientific and technical data it called for. Subsequent to release of the *Summary of Technical Review* by the Corps of Engineers, Mr. Martin Keller of the Corps of Engineers Regulatory Branch conducted a review of the situation around Lake Poinsett. According to your recent letter, Mr. Keller completed his technical review on November 9, 1999. By March of 2000, the Corps of Engineers had concluded that reopening the Section 404 permit for reconsideration was not appropriate.

Again, we renew our request that the Keller report be released. Despite the invocation of certain exemptions from FOIA in your previous letter, it is our view that the Keller report should be public. It is a fundamental principal of the Administrative Procedure Act, of which FOIA is a

part, that the basis for an agency's decision, in this case to reject a petition for revocation of a previously issued Section 404 permit, should be known to the public. The Administrative Procedure Act is designed to allow citizens to assess whether or not an agency decision is arbitrary or capricious. In order to make such a judgment, the relevant technical information must be available. "It is also clear that the agency has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process." *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980). When reviewing a government entity's decision, a court "must review and scrutinize the *entire administrative record* for the decision to ascertain whether the agency's determination has a rational basis within the record. It is the reviewing court's function to searchingly and carefully scrutinize the entire administrative record to determine whether the agency's conclusions are drawn from the facts." *National Park Concessions, Inc. v. Kennedy*, 1996 WL 560310, at 10 (W.D.Tex., 1996) (italics added). We have no information as to the basis for the Corps' decision with regard to the 404 permit. We hereby request any and all information relating to the Corps' decision to reject revocation of the 404 permit. As part of that request, we ask for a copy of the Keller report.

We are of the opinion that the Keller report is scientific in nature. It is not, in our view, a report which would be part of high level policy debates or generalized theoretical discussions about the direction of public policy. As one federal court has noted, if documents are "policy and theory oriented" they could be treated as exempt from disclosure. *Talbot Construction Company v. United States of America*, 49 FRD 68, 71 (1969). But if documents involve "factual data they are subject to production." *Id.* If the Corps seeks to claim that the Keller report involves "policy and theory," courts have required that the Corps provide "specific, document-by-document analysis in order to determine [a FOIA exemption's] applicability." *Bernson v. Interstate Commerce Commission*, 625 F.Supp. 13, 16 (D.Mass. 1985). Again, the Keller report is a technical report prepared by an engineer. Keller is not a lawyer or legal analyst and therefore his technical review should not be exempt from the broad disclosure requirements of FOIA. The exemption from disclosure should be afforded to "memoranda, such as those advising an agency of 'the types of legal challenges likely to be mounted against a proposed program, potential defenses available to the agency and the likely outcome.'" *Lawyers Committee for Human Rights v. Immigration and Naturalization Service*, 721 F.Supp. 552, 562 (S.D.N.Y. 1989) (quoting *Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 127 (D.C. Cir. 1987). In other words, the exemption should apply to documents which involve legal material and legal analysis, not to technical documents such as engineering reports. If the Corps does not release the Keller report, we request a thorough analysis of its contents in keeping with the *Bernson* ruling.

In recent years, the District of Columbia Court of Appeals has expressed concerns about the rejection of certain FOIA requests. *Schiller v. National Labor Relations Board*, 964 F.2d 1205 (D.C. Cir. 1992). In a case involving a request for documents from the National Labor Relations Board, the court rejected certain document requests because the documents involved advice on how to build a legal defense, how to litigate certain cases, instructions on preparing

and filing pleadings, and the citation of legal arguments and authorities. *Id.* at 1208. These circumstances, which involve requests for legal documents, are clearly distinct from the present case, which involves a technical report by an engineer. The *Schiller* court was also concerned about the National Labor Relations Board describing certain documents as legally related when they were not. For example, the National Labor Relations Board wrongly described a document in question as one that "suggests litigation strategies, specifically how to prepare and file answers or motions to dismiss, including suggested arguments and supporting case law." The court did not suffer the erroneous description lightly: "But the only portion of the 1-page memorandum that even remotely fits that description is footnote # 3 – and that merely says that the guidance and the preparation of answers may be obtained from the attached materials (materials that were disclosed), or from a certain NLRB official. Document 6 does not contain information privileged under exemption 5." *Id.* at 1209. The court was perturbed that the agency's actions forced a judicial remedy to a matter that should have been resolved by the agency:

> FOIA litigation is not immune from our open, adversary process. *In camera, ex parte* review, though permitted under FOIA and sometimes necessary, is generally disfavored—it "is not a substitute" for the government's obligation to justify its withholding in publicly available and debatable documents, *Lykins v. United States Dep't of Justice*, 725 F.2d 1455, 1463 (D.C. Cir. 1984), and it should be invoked only when the issue at hand "'could not be otherwise resolved,'" *Center for Auto Safety v. EPA*, 731 F.2d 16, 21 (D.C. Cir. 1984) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224, 98 S.Ct. 2311, 2318, 57 L.Ed.2d 159 (1978)). The purpose of the [exempt document] index is "to permit adequate adversary testing of the agency's claimed right to an exemption," *NTEU*, 802 F.2d at 527, and those who contest denials of FOIA requests—who are, necessarily, at a disadvantage because they have not seen the withheld documents—can generally prevail only by showing that the agency's [exempt document] index does not justify withholding information under the exemptions invoked. FOIA litigants are entitled to assume that the agency's [exempt document] index is accurate in every detail. And so is the court. There is no excuse for submitting a [exempt document] index that contains errors, even minor ones. We expect agencies to ensure that their submissions in FOIA cases are absolutely accurate.

Id. at 1209. Given the scientific nature of the Keller report and its relevance to area residents, we believe a federal court reviewing the document pursuant to 5 U.S.C. 552(a)(4)(B) would not look favorably on the Corps' decision to prevent disclosure.

We reject the argument that the Keller report is protected by attorney-client privilege. In your letter dated February 1, 2002, you make reference to the *Coastal States Gas Corporation* case decided by the District of Columbia Court of Appeals. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854 (D.C. Cir. 1980). That case involved, in part, information

provided by an auditor to an agency's counsel, similar to the facts in the present case, in which an engineer provided information to Corps officials. The court ultimately rejected the claims of the Department of Energy: "We have difficulty in perceiving any purpose which would be served by applying the attorney-client privilege in this case. While it is clear that an agency can be a 'client' and agency lawyers can function as 'attorneys' within the relationship contemplated by the privilege, this does not seem to be such a case. It is hard to imagine the 'confidential information' which an auditor might have communicated to the regional counsel." *Id.*, at 863. Similarly, it is hard to imagine the confidential information an engineer might have communicated to the Corps counsel. Other courts have concluded that "[t]here are few, if any, conceivable circumstances where a scientist or engineer employed to gather data should be considered an agent within the scope of the privilege since the information collected will generally be factual, obtained from sources other than the client." *United States Postal Service v. Phelps Dodge Refining Corporation*, 852 F.Supp. 156, 162 (E.D.N.Y. 1994) (underlining added).

The *Coastal States* court specifically distinguished between its holding and a case in which the documents in question included "material generated in the course of *negotiating a contract* between the Air Force and a private company. In such a case, the government is dealing with its attorneys as would any private party seeking advice to protect personal interests, and needs the same assurance of confidentiality so it will not be deterred from full and frank communications with its counselors. This case bears little resemblance to that situation." *Id.* (italics added). The court further noted that the "burden is on the agency to demonstrate that confidentiality was expected in the handling of these communications, and that it was reasonably careful to keep this confidential information protected from general disclosure." *Id.* We have reason to believe that Mr. Keller was not under the impression that his report would be "hidden away" by the Corps of Engineers. Furthermore, we can rely on the testimony of two individuals who were present when a third party reviewed the Keller report in the presence of Mr. Keller. Please find attached to this letter an Affidavit from Mr. Robert Harrenga, who read the Keller report in the presence of Monica Attenborough and Mr. Keller in 1999. Under such circumstances, attorney-client privilege does not exist: "The purpose of the privilege is limited to protection of confidential facts. If facts have been made known to persons other than those who need to know them, there is nothing on which to base a conclusion that they are confidential." *Id.* "If the information has been or is later shared with third parties, the privilege does not apply." *Mead Data Central, Inc. v. United States Department of the Air Force*, 566 F.2d 242, 253 (D.C. Cir. 1977) (reversing District Court finding of attorney-client privilege in FOIA litigation). "It is a well-established principle of law that the attorney-client privilege is lost if the client discloses the substance of an otherwise privileged communication to a third party. . . . This is true even if the disclosure is inadvertent." *Lewis v. Unum Corporation Severance Plan*, 203 F.R.D. 615, 620 (D.Kan. 2001) (citations omitted). Since a third party read the Keller report, the attorney-client privilege does not apply.

We similarly reject any claims that the Keller report is protected by attorney work product. Again, as stated in the *Coastal States* case cited in your letter of February 1, 2002, "[t]here is one significant limitation of the [work product] doctrine, however, which defeats the

agency's claim of privilege here; it has uniformly been held to be limited to documents prepared in contemplation of litigation." *Coastal States*, at 864 (citations omitted). The court went on to add that "it is firmly established that there is no privilege at all unless the document was initially prepared in contemplation of litigation, or in the course of preparing for trial." *Id.* at 865 (citation omitted). There is no indication in the Lake Poinsett circumstances that the Keller report was prepared in anticipation of litigation. The court further noted that "if an agency were entitled to withhold any document prepared by any person in the Government with a law degree simply because litigation might someday occur, the policies of the FOIA would be largely defeated." *Id.* at 865. Other courts have concluded that the threat of litigation must be "imminent": "The inchoate possibility, or even the likely chance of litigation, does not give rise to work product. To justify work product protection, the threat of litigation must be 'real and imminent.'" *Lewis*, at 623 (quoting *Marten v. Yellow Freight System, Inc.*, 1998 WL 13244 (D.Kan. 1998)).

Furthermore, since the work product privilege is designed to protect "attorney's mental processes," it cannot be asserted to prevent the disclosure of an engineering report which was not prepared by an attorney and is therefore devoid of legal analysis or legal thoughts. *Burton v. R.J. Reynolds Tobacco Company, Inc.*, 170 F.R.D. 481, 485 (D.Kan. 1997) (citing Federal Rule of Civil Procedure 26(b)(3) and *Upjohn Company v. United States*, 449 U.S. 383 (1981) and requiring release of correspondence prepared by counsel concerning active or proposed studies being conducted by third party concerning effects of tobacco, reviews of reports on research projects concerning smoking and health, and a report written by a consultant for a law firm which critiqued scientific studies by other scientists). The *R.J. Reynolds* decision is instructive. The court noted that the documents in question were not of a "legal nature" and did not make "reference to legal issues. They contained no legal strategy. The subject matter is scientific data." *Id.* at 488. The court further noted that the "fact that an attorney requests that a document be prepared does not necessarily cloak the document with work product immunity. Preparation of a review of scientific literature by scientists assisting the legal department for another employee of the client, whether inside or outside the legal department, does not cloak the document with work product immunity." *Id.* Since there is no indication that litigation was even remotely possible, let alone "imminent," the work product privilege cannot be asserted in these circumstances. Furthermore, since the engineering report does not include any "attorney's mental processes" and is based on scientific research, the assertion of the work product privilege is improper.

We also reject the contention that the Keller report is exempt from disclosure because it was part of the Corps' deliberative decision-making process. Rather than representing the give and take of internal policy deliberations, we have reason to believe that the Keller report was primarily a scientific and data-based report. The information called for in the *Summary of Technical Review* makes this clear. Furthermore, the report is not protected from disclosure on deliberative process grounds because Mr. Keller consulted outside parties in his review, including area landowners and individuals in Pierre, South Dakota. In a case involving documents held by the Air Force, a court held that certain documents relating to internal agency

negotiations might qualify for the disclosure exemption, but that "[i]nformation about the 'deliberative' or negotiating process outside an agency, between itself and an outside party, does not." *Mead Data Central, Inc.*, at 258. The *Mead* court also made clear that a federal agency cannot invoke a generalized harm as a basis for not disclosing a document: "An agency cannot meet its statutory burden of justification by conclusory allegations of possible harm. It must show by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA." *Id.* at 258 (citation omitted). No specific harms have been shown. The *Mead* court makes clear that the purposes of FOIA included the broad distribution of government reports and the narrow construction of any exemptions from this requirement: "The exemptions from the mandatory disclosure requirement of the FOIA are both narrowly drafted and narrowly construed in order to counter balance the self-protective instincts of the bureaucracy which, like any organization, would prefer to operate under the relatively comforting gaze of only its own members rather than the more revealing 'sunlight' of public scrutiny. Where there is a balance to be struck, Congress and the courts have stacked the scales in favor of disclosure and against exemption." *Id.* at 258.

In a review of the U.S. Post Office's invocation of the privilege, a court held that the documents in question contained "purely factual materials" and did "not concern the formulation of policy" and that "plaintiff's contention that disclosure would chill intra-agency discussion over states the harm." *United States Postal Service*, at 164-65 (citations omitted). The court found that there was "no empirical data presented to show that disclosure will result in the asserted harm of stifling candor." *Id.* at 165. The court further noted that the information contained in the documentation did not involve "important governmental policies and interests, such as national security interest in a defense contract, an interest in promotion equal employment in connection with construction contracts or special law enforcement needs in certain cases." *Id.* at 166. Similarly, the release of one engineer's report relating to one lake in South Dakota will certainly not cripple the Corps of Engineers' ability to maintain and manage the nation's waterways. Other courts agree. In a case involving the disclosure of a government bank examiner's report, a court noted that "although the tone of the examiner's comments is often blunt and chatty, the content is primarily reportorial and expository, not deliberative. The Examination Report contains the raw data of the bank examination, not the discussions, deliberations and consultations 'comprising part of a process by which governmental decisions and policies are formulated.' . . . Disclosure of such investigatory reports and factual compilations has been held not to jeopardize the consultative function that the official information privilege seeks to protect. . . . As a general rule, the lower the level of the official making the observation and the lower the level of abstraction in the writing, the less the need for the privilege." *In re Franklin National Bank Securities Litigation*, 478 F.Supp. 577, 585 (E.D.N.Y. 1979) (citations omitted). Again, the report of one Army engineer does not rise to the level of high theory or policy making. A citizen's right to know should outweigh in these circumstances. As one federal court has noted, "the real public interest under such circumstances is not the agency's interests in its administration but the citizen's interest in due process." *Bank of Dearborn v. Saxon*, 244 F.Supp. 394, 401-403 (E.D.Mich. 1965, Aff'd, 377 F.2d 496 (6th Cir. 1967). In sum, the deliberative process privilege does not apply in these circumstances.

As we have stated, the Keller report is primarily a scientific document and therefore should be disclosed. Even a minor reference to some legal topic should not be grounds for barring disclosure. To the extent that legal commentary might be included in the document, however, the rest of the document should still be disclosed. "The focus of the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material." *Mead Data Central, Inc.*, at 260. FOIA also requires that "[a]ny reasonable segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 522(b).

In sum, we request disclosure of the Keller report. Should the Keller report include some legal analysis or legal theories, we request disclosure of the report absent those portions. We also request, pursuant to the Administrative Procedure Act, any and all information relating to the Corps' decision to reject revocation of the Section 404 permit. Please contact me if you have any questions regarding this request.

Sincerely,

JON K. LAUCK
For the Firm

JKL:rvb

Enclosures

AFFIDAVIT

STATE OF SOUTH DAKOTA)
:ss
COUNTY OF MINNEHAHA

Robert Harrenga, being first duly sworn, on his oath deposes and states:

1. That he owns land near Lake Poinsett in Hamlin County, South Dakota.

2. That he and Monica Attenborough visited Mr. Martin Keller in Mr. Keller's office in Omaha, Nebraska during the fall of 1999. During that visit, Mr. Keller allowed him to read a report authored by Mr. Keller about flooding problems around Lake Poinsett.

3. That he also escorted Mr. Keller around Lake Poinsett during Mr. Keller's review of the flooding problems and consulted Mr. Keller on the situation.

Dated this 13 day of February, 2002.

Robert Harrenga

Subscribed and sworn to before me this 13th day of February, 2002.

Ruth Vanden Bosch
Notary Public – South Dakota
My Commission expires: 7-11-07